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89-65

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
FORT STEWART ASSOCIATION OF EDUCATORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the wages and money-related fringe benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a).

2. Whether compensation-related proposals—such as the Union's proposal in this case to raise the salaries of employees at two schools for dependents of Army personnel by 13.5%—are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a)(1) to set the agency's budget.

3. Whether the Union's proposals in this case are non-negotiable under 5 U.S.C. 7117 because they are "the subject of [an] agency rule or regulation" for which there is a "compelling need."

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The Acting Solicitor General, on behalf of the Fort Stewart Schools, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-30a) is reported at 860 F.2d 396. The decision of the Federal Labor Relations Authority (App., *infra,* 31a-54a) is reported at 28 F.L.R.A. 547.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. A timely petition for rehearing was denied on February 17, 1989 (App., *infra,* 55a-56a). On May 11, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including July 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. *The Federal Service Labor-Management Relations Statute*

Section 7102 (5 U.S.C.) provides in relevant part:

Each employee shall have the right * * *

* * * * *

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Section 7103 (5 U.S.C.) provides in relevant part:

(a) For the purpose of this chapter—

* * * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters

* * * * *

(C) to the extent such matters are specifically provided for by Federal statute[.]

Section 7106(a)(1) (5 U.S.C.) provides:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency.

Section 7117 (5 U.S.C.) provides in relevant part:

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

B. *The dependents schools statute and regulation*

Section 241 (20 U.S.C.) provides in relevant part:

(a) In the case of children who reside on Federal property—

* * * * *

the Secretary shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children. * * * To the maximum extent practicable, the local educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or,

in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia. For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules * * *.

* * * * *

(e) To the maximum extent practicable, the Secretary shall limit the total payments made pursuant to any such arrangement for educating children within the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State. The Secretary shall limit the total payments made pursuant to any such arrangement for educating children outside the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the amount he determines to be necessary to provide education comparable to the free public education provided for children in the District of Columbia.

Army Reg. 352-3, 1-7 provides:

Comparison factors. Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:

a. Qualifications of professional and nonprofessional personnel.

b. Pupil-teacher ratios.

c. Curriculum for grades offered, including kindergarten and summer school, if applicable.

d. Accreditation by State or other accrediting association.

e. Transportation services (student and support).

f. Length of regular and/or summer term(s).

g. Types and numbers of professional and nonprofessional positions.

h. Salary schedules.

i. Conditions of employment.

j. Instructional equipment and supplies.

STATEMENT

Fort Stewart, an Army base in Georgia, operates two elementary schools for dependents of military and civilian personnel. The Fort Stewart Association of Educators (the Union) is the bargaining representative for approximately 100 professional and nonprofessional employees of the Fort Stewart Schools. Unlike most federal employees, teachers and other personnel at dependents schools are not classified and paid under the "General Schedule" set forth at 5 U.S.C. 5332. Rather, the dependents schools statute, 20 U.S.C. 241(a), directs the Army to provide an education comparable to that provided at public schools in the State and states that "[f]or the purposes of providing such comparable education, * * * compensation * * * may be fixed without regard to the Civil Service Act and rules."

At issue here are three Union proposals relating to employee compensation, including a proposal (Proposal 2) that "the salary increase for all bargaining unit members will be 13.5%." App., *infra*, 2a n.2.[1] The Fort Stewart

[1] The other two proposals are quite lengthy and contain numerous subparts. Proposal 3 relates to the circumstances under which employees are provided paid and unpaid leave. Proposal 1 addresses a

Schools declined to bargain over the proposals, contending that they are not negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, known as the Federal Service Labor-Management Relations Statute (the Statute). The Federal Labor Relations Authority rejected this contention, and its conclusion that the proposals are negotiable was upheld by the Eleventh Circuit.

1. The Statute provides a "comprehensive * * * scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 91 (1983). Among other things, the Statute expressly recognizes the right of federal employees to form and join unions (see, *e.g.*, 5 U.S.C. 7102), and imposes upon management officials of federal agencies a general duty to bargain with their employees' unions over "conditions of employment." See *FLRA* v. *Aberdeen Proving Ground, Department of the Army*, 108 S. Ct. 1261 (1988); *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92; 5 U.S.C. 7103(a)(12), 7114, 7116(a)(5), 7117.

The Statute provides that if, during bargaining, management officials decline to negotiate over a particular proposal submitted by a union, believing "that the duty to bargain in good faith does not extend to [such] matter" (5 U.S.C. 7117(c)(1)), the union may file a negotiability appeal with the Federal Labor Relations Authority. See 5 U.S.C. 7105(a)(2)(E), 7117(c). The FLRA's rulings on negotiability are reviewable in the courts of appeals. See 5 U.S.C. 7123.

In contrast to the National Labor Relations Act, a decision that a particular proposal is negotiable under the

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variety of subjects, including such matters as summer school salaries and reimbursement for use of personal vehicles for school business. App., *infra*, 21a-30a.

Statute does more than simply require the parties to bargain in good faith. If negotiations reach an impasse, "either party may request the Federal Service Impasses Panel to consider the matter" (5 U.S.C. 7119(b)(1)), and the Panel may resolve the dispute by ordering the incorporation of the contested proposal into the collective bargaining agreement. 5 U.S.C. 7119(c)(5)(B)(iii); see *National Federation of Federal Employees* v. *FLRA*, 789 F.2d 944, 945 (D.C. Cir. 1986).

2. The Army contended that the proposals at issue were non-negotiable for three reasons. First, it argued that proposals relating to employee compensation do not concern "conditions of employment" since the Statute limits the definition of that phrase to "personnel policies, practices, and matters * * * affecting working conditions."

Second, the Army argued that the proposals were non-negotiable under the "management rights" provision of the Statute (5 U.S.C. 7106), a provision that further limits the scope of negotiations. As relevant to this case, that provision states that "nothing in this chapter shall affect the authority of any management official of any agency—(1) to determine the * * * budget * * * of the agency." The Army claimed that the proposals at issue—particularly the proposal to raise employees' salaries by 13.5%—would interfere with its right to determine its budget.

Third, the Army relied on a provision of the Statute (5 U.S.C. 7117) stating that the duty to bargain does not extend to proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)), and that the duty to bargain extends to proposals that are "the subject of any agency rule or regulation * * * only if the Authority has determined * * * that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation" (5 U.S.C. 7117(a)(2)). Another law, the dependents

schools statute (20 U.S.C. 241(e)) provides that "[t]o the maximum extent practicable," expenditures at dependents schools should be limited "to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State." In implementing that law, the Army has provided by regulation that, "to the maximum extent practicable," salary schedules at dependents schools should be the same as salary schedules at comparable public schools in the State. Army Reg. 352-3, 1-7(h). The Army contended that the proposals at issue conflicted with Section 241 and its implementing regulation, and declined to negotiate for that reason as well.

3. With the exception of three minor subparts of the proposals, the FLRA rejected the Army's arguments.[2] The FLRA first noted that it had previously rejected the argument that compensation is not a negotiable "condition[ ] of employment." App., *infra*, 35a. It next held that the Army had not established that the Union's proposals would infringe on the Army's right to determine its budget because the Army had not shown that the inclusion of any or all of the proposals in the collective bargaining agreement would "result in significant and unavoidable in-

[2] The FLRA held that two of the 15 subparts of Proposal 1 were not negotiable because they were inconsistent with federal law. (Subparts L and M propose that the schools provide free health and life insurance, but federal law limits the amount the schools may contribute toward health insurance and specifically requires union members to contribute toward life insurance. The FLRA therefore held those subparts non-negotiable under Section 7117(a)(1). App., *infra*, 41a. The FLRA also held that Section F of Proposal 3, which proposed that leave without pay "may be approved at the discretion of the immediate supervisor," was not negotiable. It concluded that the subpart infringed on management's reserved right under Section 7106(a)(2)(B) to assign work. App., *infra*, 44a.

creases in cost not affected by compensating benefits." *Id.* at 37a. Finally, relying on its prior cases involving teachers at dependents schools, the FLRA held that Section 241 does not require that employees' salaries be set by comparison with salaries at state public schools and that the Army's regulation to that effect is not justified by a "compelling need." App., *infra*, 40a-41a. The FLRA accordingly ordered the schools to negotiate with the Union over the three proposals.

Chairman Calhoun dissented. Referring to his conclusion in a prior case, he stated: "[I]n the absence of a clear expression of congressional intent to make wages and money-related fringe benefits negotiable, I would find that these matters are not within the duty to bargain." App., *infra*, 46a.

4. The Eleventh Circuit affirmed. App., *infra*, 1a-30a. It first deferred to the FLRA's conclusion that compensation-related proposals are generally negotiable where employees are not subject to the General Schedule. Although the Statute defines negotiable "conditions of employment" as "personnel policies, practices and matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)), the court concluded that "[t]his definition alone does not exclude compensation and fringe benefits." App., *infra*, 7a. Turning to the numerous statements in the legislative history that compensation would not be negotiable under the Statute, the court dismissed them on the ground that the statements were made "with the understanding that Congress generally regulates such matters." *Id.* at 10a. The court acknowledged (*id.* at 9a) the decision of the Third Circuit holding that compensation is not a negotiable "condition[ ] of employment" (*Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409 (1988)), but stated that it agreed with the Second Circuit's

contrary conclusion in *West Point Elementary School Teachers Association* v. *FLRA*, 855 F.2d 936 (1988).

The court gave three reasons for agreeing with the Second Circuit that such proposals do not interfere with the Army's right to determine its budget. First, the court said that "[t]he proposals would not necessarily increase the Army's costs" (App., *infra*, 20a), although it did not explain how a 13.5% increase in salaries could fail to increase costs. Second, the court stated that "any increase in the employees' salaries would not significantly increase the Army's budget," which "includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools." *Ibid.* Third, the court said that the Army had failed to establish "that no compensating benefits would offset such costs even if its costs increased." *Ibid.*

The court also agreed with the Second Circuit that the proposals were not precluded by Section 241 of the dependents schools statute or the Army's implementing regulation. The court recognized that "Section 241 requires that the Army 'to the maximum extent practicable' provide a comparable education to local public schools at a cost per pupil not exceeding the per pupil cost of free public education in local communities." App., *infra*, 13a. However, the court concluded, the Army could maintain cost parity and educational comparability despite wide variations in teachers' salaries. "For example, books, building maintenance, athletic programs, clubs, and lunch services also enter into this calculation." *Id.* at 19a. For that reason, the court found that there was no "compelling need" for the Army's regulation providing that employees' salaries must be set by comparison with those at comparable public schools.

REASONS FOR GRANTING THE PETITION

Review is warranted because the court below incorrectly decided an issue of considerable importance to the federal government, and the issue is one on which the courts of appeals are in conflict.

1. There are "forty-odd federal pay systems which are not entirely fixed by statute." *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989). Disputes involving employees of the Army's domestic dependents schools have spawned decisions by the Second Circuit (*West Point*), the Fourth Circuit (*United States Department of Defense Dependent Schools, Fort Bragg* v. *FLRA*, 838 F.2d 129, 130 (4th Cir. 1988) (vacated)), and the Sixth Circuit (*Fort Knox Dependent Schools* v. *FLRA*, No. 87-3395 (May 11, 1989), petition for reh'g en banc pending (filed June 23, 1989). In addition, the courts of appeals have considered cases involving teachers at overseas dependents schools (*Department of Defense Dependents Schools*), which are governed by a different statute (20 U.S.C. 902) from that governing domestic schools; civilian mariners employed by the Navy (*Military Sealift Command*), whose pay, under 5 U.S.C. 5348, is set by comparison with mariners employed by private vessels; electricians employed by the Bureau of Engraving and Printing (*Department of the Treasury, Bureau of Engraving and Printing* v. *FLRA*, 838 F.2d 1341 (D.C. Cir. 1988)), who are "prevailing rate employees" governed by 5 U.S.C. 5349(a); and employees of the Nuclear Regulatory Commission (*Nuclear Regulatory Commission* v. *FLRA*, 859 F.2d 302 (4th Cir. 1988), reh'g en banc granted (Jan. 6, 1989)), who are excepted from the General Schedule by 42 U.S.C. 2201(d). As these cases illustrate, the forty-odd categories of federal employees affected by the questions

presented here involve a large and diverse group. Whether they may negotiate over the amount of compensation (wages and money-related fringe benefits) they receive is a question of great importance to the employees and their agencies.

The courts of appeals are split as to the first question presented—whether compensation is a negotiable "condition[ ] of employment." The Third Circuit (*Military Sealift Command*), the Sixth Circuit (*Fort Knox*), and the District of Columbia Circuit (*Department of Defense Dependents Schools*) have held that compensation is not negotiable. The Second Circuit (*West Point*) and the Fourth Circuit (*Nuclear Regulatory Commission*),[3] as well as the court below, have held that compensation is negotiable. The conflict is express: the court below acknowledged its disagreement with the Third Circuit (App., *infra,* 9a); the District of Columbia Circuit noted that it was "fully aware of contrary decisions" by the court below, the Third Circuit, and the Fourth Circuit (863 F.2d at 994 n.12); and the Sixth Circuit cited the decisions of the three circuits that have upheld the FLRA (including the decision here) while it followed the other two (slip op. 6-7). Although rehearing en banc has been granted by the District of Columbia and Fourth Circuits, and a petition for rehearing is pending in the Sixth Circuit, the conflict can only be resolved by this Court, since the Third Circuit disagrees with both the Second Circuit and the court below and the decisions of all three circuits are final.

There is no express conflict on the question whether compensation-related proposals conflict with management's right to control its budget. The Second Circuit and

[3] Under the Fourth Circuit's rules, the panel decision in *Nuclear Regulatory Commission* was vacated when rehearing en banc was granted.

the court below have upheld the FLRA's position that pay is almost always negotiable despite the management rights provision, while the three courts holding that pay is not a negotiable "condition[ ] of employment" did not reach the issue. This question should be considered by this Court because it is closely related to the first question presented: the budget control clause of the management rights provision reinforces the view that Congress did not intend compensation-related proposals to be negotiable. Moreover, if the Court concludes that compensation is a negotiable "condition[ ] of employment," then a decision is needed with respect to the management rights issue in order to resolve the dispute in this case and all of the related cases.

The third question presented also warrants consideration by this Court. There is a direct conflict on this question—whether there is a "compelling need" for the Army regulation providing that compensation rates at dependents schools are to be set by comparison with rates at comparable public schools. Like the court below, the Second Circuit in *West Point* (855 F.2d at 942-943) has agreed with the FLRA, while the Sixth Circuit held to the contrary in *Fort Knox,* expressly disagreeing with the decision below and the decision in *West Point* (slip op. 6-7).[4]

In addition, most of the cases raising the question whether compensation is a negotiable "condition[ ] of employment" involve statutes providing that pay rates are to be set by comparison with some other group of employees. See, *e.g., Military Sealift Command* (Navy civilian mariners' pay rates are set by comparison with rates paid private mariners under 5 U.S.C. 5348); *Bureau of Engrav-*

[4] As the Sixth Circuit noted (slip op. 7), the Fourth Circuit in *Fort Bragg,* in a decision that was subsequently vacated as moot, also held that, under Section 241, there is a "compelling need" for the Army's regulation.

ing and Printing (electricians are "prevailing rate employees" under 5 U.S.C. 5349(a)); *Department of Defense Dependents Schools* (overseas teachers' salaries are set by comparison with salaries at large urban school districts under 20 U.S.C. 902). The FLRA's approach has been to hold that since each of these statutes grants the agency involved some discretion, virtually any proposal relating to compensation is subject to negotiation. In our view, however, Congress's direction that compensation be set on the basis of a comparison with other rates of pay is not consistent with such a broad view of negotiability.

Thus, if this Court does not agree with us on the proper disposition of the first and second questions presented, it would need to reach the third question in order to resolve this dispute; moreover, disposition of that question would also resolve a direct conflict in the circuits and would provide guidance in many other cases. Accordingly, review is warranted with respect to all three questions presented.[5]

2. The court of appeals decided each of the three questions in this case incorrectly.

a. Congress extended collective bargaining in the federal sector only to "conditions of employment" (5 U.S.C. 7102(2)), which it defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14). Although the FLRA's interpretation

[5] In *Fort Knox*, the dissenting judge noted (slip op. 13 n.3) that Congress in 1985 directed the Army to submit, by March 1, 1986, a plan to transfer the domestic dependents schools to the local school districts of the States in which the schools are located. Act of Dec. 3, 1985, Pub. L. No. 99-167, § 824, 99 Stat. 992. However, the Army found that the States were not anxious to operate the schools, and, instead of submitting a plan to transfer the schools, the Army submitted a letter to Congress explaining its finding. Thus, there is no current plan to transfer the schools to the States.

of the Statute is entitled to deference if that interpretation is a reasonable reading of an ambiguous provision, a "straightforward, natural reading of the statutory language fails to yield the FLRA's interpretation, namely that 'working conditions' should be read to include 'wages.' Far from it. The term 'working conditions' ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job. Thus, for example, [the District of Columbia Circuit] has upheld the FLRA's conclusion that matters relating to job safety and office environment are 'central' to an employee's working conditions. However, it is entirely unclear how an employee's compensation can be seen as 'affecting' such working conditions." *Department of Defense Dependents Schools*, 863 F.2d at 990 (citation omitted).[6] Compensation is properly viewed as a "term" of employment rather than a "condition" of employment, and the Statute does not make "terms of employment" negotiable.

Moreover, because matters of compensation are typically at the core of collective bargaining in the private sector, one would expect that any congressional purpose to include that subject within the scope of collective bargaining in the federal sector would be clearly expressed. But no such expression can be found. Thus, the Statute stands in striking contrast with the two instances where Congress did make clear its intent to permit federal employees to bargain over compensation. First, the Postal Reorganiza-

[6] As the District of Columbia Circuit stated in that case, "[D]eference is, of course appropriate in a *Chevron* Step Two analysis, where the issue would be whether the FLRA's interpretation of its own statute is reasonable; but deference is not the correct analytic mode under *Chevron* Step One, where our task is to assess independently the evidence of Congressional intent." 863 F.2d at 994 n.12. (The court's reference was to *Chevron U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 & n.9 (1984).)

tion Act grants to postal workers the right to bargain over "wages, hours, and working conditions." 39 U.S.C. 120 note. By referring separately to "wages" and "working conditions," Congress showed that it does not consider the latter to include the former.[7]

Second, Section 704 of the Civil Service Reform Act of 1978, 5 U.S.C. 5343 note, provides in subsection (a) that "prevailing rate employees" who bargained over wages and other matters prior to August 19, 1972, may continue to bargain over "terms and conditions of employment," and in subsection (b) that the "pay and pay practices" subject to negotiation under the provision are to be negotiated in accordance with current prevailing practices. If, as the FLRA has held, the Federal Service Labor-Management Relations Statute confers on federal employees who are to be paid according to prevailing practices a general right to bargain about wages, Congress did not need to enact Section 704 in order to create a special rule allowing negotiation by workers in bargaining units that had negotiated over wages prior to August 19, 1972.

The legislative history of the Statute "is replete * * * with indications that Congress did not intend to subject pay of federal employees to bargaining." *Military Sealift*

[7] Similarly, the National Labor Relations Act (NLRA), 29 U.S.C. 158(d), separates "wages" from "working conditions" in making "wages, hours, and other terms and conditions of employment" negotiable. The court below noted that the NLRA refers to *other* conditions of employment, and concluded that the language of Section 158(d) supports the FLRA's conclusion that compensation is a "condition[ ] of employment." App., *infra*, 8a. However, the NLRA refers to "other *terms* and conditions of employment" (emphasis added). We agree with the District of Columbia Circuit that "other terms * * * of employment" refers back to "wages," while "other * * * conditions of employment" refers back to "hours." See *Department of Defense Dependents Schools*, 863 F.2d at 991 n.3.

Command, 836 F.2d at 1417. Representative Ford had proposed a bill which would have provided for "the negotiation of pay and other major money-related fringe benefits." See 124 Cong. Rec. 25,721 (1978) (discussing H.R. 9094). And Representative Heftel, during the House Committee markup of the federal labor statute, introduced a proposal that would have extended the obligation to negotiate to "pay practices" and "overtime practices" so far as "consonant with law and regulation." House Comm. on Post Office and Civil Service, Subcomm. on Postal Personnel and Modernization, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute* 1087-1088 (1979) (proposing new Section 7115(b)). "Neither proposal was adopted, a fact of no little interpretive significance." *Department of Defense Dependents Schools*, 863 F.2d at 992 (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987)).

In addition, both the Senate and House Committee reports state unequivocally that the federal labor statute does not provide for "bargaining on wages or fringe benefits." H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978); see also S. Rep. No. 969, 95th Cong., 2d Sess. 13 (1978). Furthermore, every legislator who addressed the issue of compensation—and there were several (see, *e.g.*, 124 Cong. Rec. 25,716 (1978) (remarks of Rep. Udall); *id.* at 29,182 (remarks of Rep. Udall); *id.* at 24,286; *id.* at 25,720 (remarks of Rep. Clay); *id.* at 25,721 (remarks of Rep. Ford); *id.* at 29,188 (remarks of Rep. Derwinski); *id.* at 27,549 (remarks of Sen. Sasser))—stated that it was not negotiable. There is not a single statement in the entire legislative history to the effect that compensation fell within the general bargaining duty established by the federal labor statute.[8]

[8] In reaching its conclusion, the court below relied heavily on a statement of Congressman Clay that when a statute merely vests dis-

The court of appeals suggested that Congress ratified two decisions of the FLRA's predecessor, the Federal Labor Relations Council, which supported the proposition that federal employees may negotiate over wages not specifically set by statute. App., *infra,* 12a-13a. The District of Columbia Circuit explained why those decisions do not compel affirmance of the FLRA's conclusion: "Although we will normally presume that Congress intends to continue the interpretation accorded to a prior statute when it substantially re-enacts that law, such a presumption is plainly inapposite in a situation, such as the case at hand, where Congress has clearly expressed its intent to the contrary." *Department of Defense Dependents Schools,* 863 F.2d at 993 n.9. Indeed, "[m]ore than that, logic indicates that Congress would not leave to various federal agencies the authority to expand the budgets and fiscal limitations placed upon those agencies by requiring them to bargain about increases in pay and fringe benefits once budget boundaries were set by the Congress. It is obvious that salary and fringe benefits are the items most likely to involve substantial overspending if left to collective bargaining, particularly with respect to a school system for minor dependents of United States military and civilian personnel." *Fort Knox,* slip op. 5.

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cretionary authority over a matter with a particular official, the matter is subject to bargaining. App., *infra,* 11a (quoting 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978)). That statement did not address the question of compensation. When Representative Clay did address that question, he twice "assure[d] [his] colleagues that there is nothing in th[e federal labor statute] which allows Federal employees the right to * * * negotiate over pay and money-related fringe benefits." 124 Cong. Rec. 25,720 (1978); see also *id.* at 24,286 (remarks of Rep. Clay). To read Congressman Clay's general statement as supporting the court of appeals' position thus "puts Congressman Clay at war with himself over the issue." *Military Sealift Command,* 836 F.2d at 1418.

b. The court of appeals also erred in holding that the proposals at issue do not infringe on the Army's right to control its budget. The FLRA's test of negotiability under the budget control clause of the management rights provision (Section 7106(a)(1)) requires an agency to "make a substantial showing that the proposal requires the inclusion of a particular program or amount in its budget or that the proposal will result in significant and unavoidable increases in cost not affected by compensating benefits." App., *infra,* 36a. The Army should be held to have satisfied that test simply by showing that the Union proposed a 13.5% pay raise for all employees. Yet the court of appeals found that showing insufficient on three grounds, none of which should be sustained.

First, the court suggested that the Army had failed to show that the proposals would "necessarily increase [its] costs." App., *infra,* 20a. That observation overlooks the obvious fact that salaries are a major component of any school budget and that a 13.5% increase in salaries would have to increase costs.

Second, the court suggested that any increase in costs would not be significant. It reached that conclusion only by comparing the increase in the cost of operating the dependents schools to the Army's budget as a whole, including its budget for armaments. App., *infra,* 20a. That approach is plainly flawed. Whether a proposal will cause a significant increase in costs should be tested by comparison with the costs of the program employing the bargaining unit employees, not the entire agency budget. Otherwise, virtually no proposal could be found to be "significant." That is certainly the case with respect to the dependents schools operated by the Army. Given the size of the Army's share of the defense budget, any proposal involving dependents schools could only amount to a tiny percentage of the Army's total expenditures.

Finally, the court stated that the Army had failed to establish that any increase in costs resulting from the proposals would not be offset by "compensating benefits." App., *infra,* 20a. As an initial matter, it is not clear what compensating economic benefits might flow from a flat across-the-board salary increase. Moreover, the requirement of such a showing is contrary to the Statute. The quintessential decision that any entity, be it a federal agency or a private party, makes when crafting a budget is whether the benefits that flow from a given action exceed its costs. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (requiring cost-benefit analysis for agency actions). A budget is, in essence, a series of decisions designed to maximize the benefits obtained from spending a discrete amount of money. To say that agency management has the right to determine the agency's budget is to say that it is up to management, and management alone, to determine the best allocation of the agency's resources.

c. The court of appeals also erred in concluding that there is no "compelling need" for the Army's regulation (Army Reg. 352-3, 1-7) requiring that salaries be set by comparison with salaries at public schools. The court correctly noted that because Section 241 is not part of the Federal Service Labor-Management Relations Statute, the FLRA's construction of that provision is not entitled to deference. App., *infra,* 13a. However, the court erred in failing to defer to the Army's reasonable construction of the dependents schools statute. See *Fort Knox,* slip op. 6-7.

Under Section 241(a), the Army must "take such action as may be necessary to ensure that the education provided * * * is comparable to free public education provided for children in comparable communities in the State * * *, [and] [f]or the purpose of providing such comparable education, personnel may be employed and the compensation * * * fixed without regard to the Civil Service Act and rules." In addition, Section 241(e) provides that, "[t]o the maximum extent practicable," the Army "shall limit the total payments made pursuant to any such arrangement for educating children * * * to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State." The Army in its regulation has reasonably interpreted Congress's mandate to require that the various components of an educational system listed in its regulation—including both salary schedules and such items as pupil-teacher ratios, transportation services, and instructional equipment and supplies—shall be modeled on those of comparable public schools. Indeed, it is difficult to conceive how the Army could implement Section 241 without modeling each major component of dependents schools on state public schools.

The court of appeals' suggestion that the Army could comply with Section 241 while paying salaries significantly in excess of those paid at public schools (App., *infra,* 18a-19a) is fanciful. Suppose, for example, that a dependents school made major increases in pupil-teacher ratios in order to maintain the level of per-pupil costs despite a large salary increase (such as a 13.5% increase), and the parents of children at the schools charged that the Army had violated Section 241(a) by failing to provide an education "comparable to free public education provided for children in comparable communities in the State." The Army would surely not be able to defend, say, a 40-1 student teacher ratio, when comparable public schools had a 20-1 ratio, by showing that it was paying its teachers more than the going rate.

The 13.5% increase and other money-related requests proposed here—proposals not even purporting to be based on practices at public schools in comparable commu-

nities—are contrary to both the regulation and the mandate of Section 241 and are therefore non-negotiable.[9] Indeed, the direct violation of Section 241 that such proposals would entail is itself demonstrative of the "compelling need" for the regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1989

[9] Chairman Calhoun noted in his dissent from the FLRA's decision (App., *infra*, 46a) that Subproposals A and D of the first proposal (which appear to be contrary to the request for a 13.5% salary increase in the second proposal) seem to assume that management will set salaries by comparison with public school salaries. By those proposals, the Union appears only to ask for information concerning the data the Army collects and for consultation with management concerning salaries. As Chairman Calhoun concluded, those proposals are not objectionable.

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-8734

FORT STEWART SCHOOLS, PETITIONER, CROSS-RESPONDENT

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT, CROSS-PETITIONER

Fort Stewart Association of Educators, Intervenor

NOV. 21, 1988

Before: VANCE and HATCHETT, Circuit Judges, and NESBITT*, District Judge.

HATCHETT, Circuit Judge:

Fort Stewart Schools (Army) seeks review of a Federal Labor Relations Authority (FLRA) decision and order requiring it to negotiate three proposals with the Fort Stewart Association for Educators (Union). The FLRA and the Union cross-petition this court to enforce the FLRA's decision and order. For the reasons discussed below, we grant the FLRA's and Union's petition to enforce the FLRA's order and deny the Army's petition for review.

* Honorable Lenore C. Nesbitt, U.S. District Judge for the Southern District of Florida, sitting by designation.

FACTS

The Army operates two elementary schools for military and civilian personnel's dependents (dependents schools) at Fort Stewart, Georgia. *See* 20 U.S.C. § 241 (1974 & Supp.1988) (Secretary of Education authorized to make arrangements with federal agencies to operate schools under certain circumstances). The schools provide free public education for military and civilian personnel's children who reside on the federal property. The Union, an affiliate of the National Education Association, acts as the collective bargaining representative for the schools' ninety-nine teachers and other employees.

During contract negotiations with the Army, the Union submitted three proposals for bargaining. The first proposal included sections which set mileage reimbursement, mandated certain insurance programs, and gave the Union the right to review and comment on salary schedules.[1] The second proposal suggested a fixed salary increase of 13.5-percent for the teachers and other employees for the subsequent school year.[2] The third proposal detailed various leave practices such as personal leave, sick leave, professional leave, maternity leave, and leave without pay.[3] The Army refused to negotiate these three proposals, contending that the proposals did not involve mandatory bargaining matters.

PROCEDURAL HISTORY

The Union filed a negotiability appeal with the FLRA seeking a determination that each proposal involved a

[1] See Appendix A.

[2] Proposal 2.

The Association and the Employer agree that the salary increase for all bargaining unit members will be 13.5% for the school year.

[3] See Appendix B.

mandatory bargaining subject. *See* 5 U.S.C. § 7117(c) (1980). The FLRA agreed with the Union and ordered the Army to negotiate the three proposals with the Union.[4]

In reaching its decision, the FLRA rejected all the Army's contentions. First, the FLRA dismissed the Army's contention that the proposals do not concern conditions of employment. The FLRA reiterated its prior conclusion that the Federal Service Labor-Management Relations Act (FSLMRA) does not preclude all bargaining over employee compensation. 5 U.S.C. §§ 7101-7135 (1980). *See Fort Bragg Unit of N.C. Assoc. of Educators, Nat'l. Educ. Assoc. and Fort Bragg Dependents Schools, Fort Bragg, N.C.*, 12 F.L.R.A. 519 (1983) (WESTLAW FLB-FLRA database) (Congress did not intend to exclude dependents schools' employees' compensation and related benefits from negotiable conditions of employment in the FSLMRA). Furthermore, the FLRA found that the proposals involved "conditions of employment" because "the matters proposed are not specifically provided for by law and are within the discretion of the [Army]; and . . . the proposals are not otherwise inconsistent with law, applicable government-wide rule or regulation, or with an [Army] regulation supported by a compelling need."[5] *American Federation of Government Employees; AFL-CIO, Local 1897 and Dept. of the Air Force, Eglin Air Force Base, Florida*, 24 F.L.R.A. (No. 41) 377 (1986) (WESTLAW FLB-FLRA database). Chairman Calhoun dissented, however, claiming that the duty to bargain does

[4] The FLRA excluded three sections from its order: Sections L and M of Proposal 1 and Section F of Proposal 3. The FLRA held that these sections involved nonnegotiable matters.

[5] Alternatively, the FLRA concluded that even if the Army properly refrained from negotiating the compensation matters, it still had a duty to negotiate Sections A, C, and D of Proposal 1 because they did not involve compensation.

not encompass proposals concerning wages and money-related fringe benefits absent a clear congressional intent to make such matters negotiable.

The FLRA also held that the proposals did not interfere with the Army's right to determine its budget. The FLRA concluded that the Army failed to show that the proposals would significantly and unavoidably increase the Army's costs without producing compensating benefits to offset the alleged costs. *See American Federal* [*sic*] *of Gov't Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio,* 2 F.L.R.A. (No. 77) 604 (1980) (WESTLAW FLB-FLRA database), *enforced as to other matters sub nom. Dep't of the Air Force v. FLRA,* 659 F.2d 1140 (D.C.Cir.1981), *cert. denied sub nom., AFGE v. FLRA,* 455 U.S. 945, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982) (interference with the right to set a budget requires prescribing particular programs or amount allocated for such programs, or causing inevitable significant cost increases without any offsetting benefits).

The FLRA rejected the Army's contention that bargaining over compensation violates other federal laws. First, the FLRA determined that the proposals do not conflict with laws that regulate the solicitation of contract bids in the procurement process. The procurement laws mandate that federal agencies award contracts for professional services through competitive bidding. 10 U.S.C. § 2304 (1983 & Supp.1988). The FLRA noted that it previously dismissed this same claim because procurement law does not govern teachers and employees in the dependents school system. *See Fort Knox Teachers Assoc. and Board of Educ. of the Fort Knox Dependent Schools,* 27 F.L.R.A. (No. 34) 203 (1987) (WESTLAW FLB-FLRA database) (dependent school teachers and employees are federal government employees rather than independent contrac-

tors making procurement laws inapplicable to them). Second, the FLRA concluded that the proposals do not violate the Anti-Deficiency Act. The Anti-Deficiency Act prohibits an agency from obligating itself to pay money before Congress appropriates funds. 31 U.S.C. § 1341 (1983). Although the proposals obligate the Army to spend funds for salaries in the succeeding fiscal year, the FLRA noted that the Army's obligation accrues only when the employees earn the salaries. *Fort Knox Dependent Schools,* 27 F.L.R.A. at 217. Therefore, the government will appropriate funds before the Army incurs these obligations.

Finally, the FLRA ruled that the Army did not establish a compelling need for its regulation that requires it to pay dependents schools' employees a comparable salary to local public school employees. The FLRA, relying on a prior decision, held that "nothing in either [20 U.S.C. § 241] or its legislative history persuades us that Congress intended to restrict the [Army's] discretion as to the particular employment practices which could be adopted." *See Fort Knox Teachers Assoc.,* 27 F.L.R.A. at 216 (comparable education requirement in section 241 does not mandate comparable compensation). Consequently, the FLRA concluded that the Army failed to demonstrate a compelling need for its regulation. Moreover, the FLRA concluded that even if a compelling need existed, the Army did not show that Sections A through G, and I and J, of Proposal 1 conflicted with the Army's regulation.

The Army brought this petition for review of the FLRA's decision and order pursuant to the FSLMRA. *See* 5 U.S.C. § 7123(a) (1980). In response, the FLRA and the Union cross-petitioned for enforcement of the FLRA's order. *See* 5 U.S.C. § 7123(b) (1980).

ISSUES

The Army petitions for review of the following issues: (1) Whether the Army has a statutory duty to bargain because the Union's proposals involve "conditions of employment" within the Army's discretion; (2) whether the Army established a compelling need for its regulation that mandates equality of compensation between employees in dependents schools and local public schools; and (3) whether the Union's proposals interfere with the Army's right to determine its own budget.

DISCUSSION

A. *Conditions of Employment*

The FSLMRA gives federal employees the right to negotiate over "conditions of employment." 5 U.S.C. § 7102(2) (1980). Conditions of employment include "personnel policies, practices, and matters, whether established by rule or regulation, or otherwise, affecting working conditions. . . ." 5 U.S.C. § 7103(a)(14) (1980). Despite this broad definition, Congress has imposed two limits on the scope of the duty to bargain. First, the term "conditions of employment" excludes any matters "specifically provided for by Federal Statute." 5 U.S.C. § 7103(a)(14)(C) (1980). Second, the duty to bargain excludes matters that conflict with "any Federal law or Government-wide rule or regulation," or any agency regulation for which a compelling need exists. 5 U.S.C. § 7117(a)(2) (1980).

The Army contends that "conditions of employment" in the FSLMRA do not include wages and money-related benefits. The Army further contends that even if the term "conditions of employment" is ambiguous, the Union's proposals conflict with federal law, excluding them from

the statutory duty to bargain. The Union and the FLRA contend that the Army has a duty to negotiate the Union's proposal because the proposals involve conditions of employment within the Army's discretion.

1. Congressional Intent: FSLMRA's Language and Legislative History

Relying on prior decisions, the FLRA determined that the FSLMRA does not prohibit bargaining over compensation and fringe benefits under the following conditions: the agency has discretion over such matters; Congress has not specifically provided for these matters; and the proposals do not conflict with law, government-wide rule or regulation, or an agency regulation for which a compelling need exists. *Fort Knox Teachers Assoc. and Fort Knox Dependents Schools,* 28 F.L.R.A. (No. 29) 179 (1987) (WESTLAW, FLB-FLRA Database). Because this FLRA decision is within its authority, we must defer to its conclusion unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (1977); *West Point Elementary School Teachers Assoc. v. FLRA,* 855 F.2d 936, 939-40 (2d Cir.1988); *see Library of Congress v. FLRA,* 699 F.2d 1280, 1289 (D.C.Cir.1983) ("Congress has specifically entrusted the [FLRA] with the responsibility to define the proper subjects for collective bargaining [under the FSLMRA], drawing upon its expertise and understanding of the special needs of the public sector labor relations.")

Our examination of the FSLMRA and its legislative history supports the FLRA's conclusion. The FSLMRA defines conditions of employment as "personnel policies, practices and matters . . . affecting working conditions. . . ." 5 U.S.C. § 7103(a)(14) (1980). This definition alone does not exclude compensation and fringe benefits.

The Army, however, argues that a comparison between the FSLMRA and the National Labor Relations Act (NLRA) reveals that "conditions of employment" do not include wage and fringe benefits. The NLRA allows bargaining over "wages, hours and *other* terms and conditions of employment." 29 U.S.C. § 158(d) (Supp. 1988) (emphasis added). The Army urges that "conditions of employment" in the FSLMRA encompasses a narrower range of bargainable matters than the NLRA terminology because the FSLMRA did not specifically list wages and hours as bargainable matters. In contrast to the Army's position, the absence of the terms "wages" and "hours" from the FSLMRA does not prove that Congress intended to exclude them from negotiations. Rather, the NLRA's description of bargainable matters supports the FLRA's position. By using the word "other," Congress included wages and hours in the general category of "conditions of employment." Congress likely specified "wages" and "hours" in the NLRA merely to illustrate the meaning of the new term "conditions of employment." In the FSLMRA, Congress simply used the general term "conditions of employment," which encompasses wages, to define the scope of negotiable matters.

The Army further argues that another section of the FSLMRA demonstrates that Congress did not intend conditions of employment to include wages. The Civil Service Reform Act of 1978, which includes the FSLMRA, specifically provides that the FSLMRA does not apply to prevailing rate employees who had negotiated over pay prior to August 19, 1972, to the extent that any of the FSLMRA's provisions conflict with their negotiation practices. The Army contends that this section serves no purpose if the FSLMRA authorizes employees, whose wages Congress did not set, to bargain for wages. The legislative

history demonstrates that this section serves a purpose even if the FSLMRA allows bargaining over wages. Congressman Ford stated this section's purpose: "This provision is required because of two recent rulings by the Comptroller General which . . . held that specific legislative authorization was necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice." 124 Cong. Rec. H8468 daily ed. Aug. 11, 1978) (remarks of Rep. Ford). Thus, this provision clarifies and extends the exemption from the prevailing rate act for such employees. *American Federal of Government Employees*, 24 F.L.R.A. at 380.

Turning from the FSLMRA's language to its legislative history, the Army argues, citing the Third Circuit, that Congress did not intend to allow bargaining over compensation. The Third Circuit recently held that Congress did not intend the FSLMRA to allow bargaining over the Navy's pay practices for the Military Sealift Command's (MSC) civilian mariners. *Dep't. of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409 (3d Cir.1988). The court found that section 5348 of the prevailing rate system specifically gives the Navy limited discretion over the MSC's pay practices. *Dep't. of the Navy*, 836 F.2d at 1410. Because bargaining over such pay practices is outside the Navy's discretion, such negotiation would conflict with law, excluding the matters from the duty to bargain. The court examined the FSLMRA's legislative history to determine if Congress intended the FSLMRA to supersede section 5348 and subject the MSC's pay practices to collective bargaining. *Dep't. of the Navy*, 836 F.2d at 1417. The court concluded that Congress did not intend the FSLMRA to allow federal employees to negotiate over compensation. *Dep't. of the Navy*, 836 F.2d at 1419.

In contrast, the Second Circuit implicitly adopted the FLRA's conclusion that the FSLMRA does not bar

negotiation of proposals involving compensation and fringe benefits. *See West Point Elementary School Teachers Assoc.*, at 942. The court concluded that "conditions of employment" in the FSLMRA included wage and fringe benefit proposals when the federal government did not specifically provide for such matters. *West Point Elementary School Teachers Assoc.*, at 942.

Despite the Third Circuit's holding that Congress did not intend the FSLMRA to allow federal employees to bargain over wages, we agree with the FLRA and the Second Circuit that Congress did not intend to preclude all bargaining over compensation. The legislative history indicates that Congress intended to treat wages and fringe benefits as other conditions of employment; the parties must bargain over them unless a federal statute specifically provides for them or the proposed matters would conflict with law. *See* 5 U.S.C. §§ 7103(a)(14)(C) and 7117(a)(1)(1980). Because federal law dictates nearly all federal employees' wages, the legislative history contains many general statements claiming that the FSLMRA does not make wages negotiable. *See* 5 U.S.C. § 5341-5349 (1980 & Supp.1988).

A close examination of the congressional reports and debates reveals that the FSLMRA's supporters made these statements with the understanding that Congress generally regulates such matters through its prevailing rate acts, not with the understanding that the FSLMRA barred all wage negotiations. The House Report on the Committee's bill provides: "Federal pay will continue to be set in accordance with the pay provisions of title 5, and fringe benefits, including retirement, insurance, and leave, will continue to be set by Congress." H.R.Rep. No. 95-1403, 95th Cong., 2d Sess. 12 (1978). Congressman Udall, the sponsor of the amended version which Congress ultimately

enacted into law stated, "[t]here is not really any argument in this bill or in this title about federal collective bargaining for wages and fringe benefits and retirement. . . . All these major regulations about wages and hours and retirement and benefits will continue to be established by law through congressional action." 124 Cong.Rec. H9633 (daily ed. Sept. 13, 1978) (remarks of Rep. Udall); *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 923 (1979) [hereinafter *Legislative History*]. Moreover, Congressman Ford who strenuously advocated the bill's adoption stated: "[N]o matters *that are governed by statute (such as pay, money-related fringe benefits,* retirement and so forth) could be altered by a negotiated agreement." 124 Cong.Rec. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford); *Legislative History* at 855-56 (emphasis added). Finally, Congressman Clay, supporting Congressman Udall's substitute legislation, stated:

> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong.Rec. H9638 (daily ed. Sept. 13, 1978) (remarks of Rep. Clay); *Legislative History* at 933. Thus, although

some legislators' remarks baldly assert that wages are not negotiable, the above comments indicate that the legislators merely were assuring their peers that the FSLMRA would not supplant specific laws which set wages and benefits.

The legislative history additionally demonstrates that Congress intended the FSLMRA to continue the existing practices regarding the negotiation of wages. Congressman Clay stated that "employees *still* . . . cannot bargain over pay." 124 Cong. Rec. E4293 (daily ed. Aug. 3, 1978) (remarks of Rep. Clay); *Legislative History* at 839 (emphasis added). Similarly, Congressman Devinski stated that wages and fringe benefits remained beyond the scope of collective bargaining. 124 Cong.Rec. H9639 (daily ed. Sept. 13, 1978) (remarks of Rep. Devinski); *Legislative History* at 935.

One such existing practice allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits. *American Fed'n of Gov't Employees,* 24 F.L.R.A. at 381; *see United Fed'n of College Teachers, Local 1460 and U.S. Merchant Marine Academy,* 1 FLRC 211 (1972) (Federal Labor Relations Council (FLRC) held that the academy's teachers could bargain for their wages because their proposals did not violate the laws giving the Secretary of Commerce discretion to set their salaries); *Overseas Educ. Assoc., Inc. and Dept. of Defense, Office of Dependents Schools,* 6 FLRC 231 (1978) (the duty to bargain encompassed proposals involving procedures and formulas for setting teacher compensation because the federal act governing these teachers' pay did not bar negotiation on the proposals). Congress should have known of this practice because the FSLMRA specifically mandates that decisions under Executive Order 11941 continue in effect

unless superceded [*sic*]; the FLRC administered the above decisions under this executive order. 5 U.S.C. § 7135(b) (1980). Consequently, we agree with the FLRA that Congress did not intend to preclude bargaining over wages and related benefits.

2. Relationship of the Union's Proposals to Federal Law

As mentioned above, the FSLMRA excludes from conditions of employment any matters provided for by federal statute or inconsistent with federal law. 5 U.S.C. §§ 7103(a)(14)(C) & 7117(a)(2) (1980). Although the federal prevailing rate act sets wages for most federal employees, the statute creating the Fort Stewart schools specifically excludes the schools' employees from these federal laws. *See* 20 U.S.C. § 241. The Army contends, however, that federal law still provides for these employees' wages and benefits. The Army argues that section 241 specifically sets compensation and leave practices for these employees because this section requires it to compensate the dependents schools' employees according to local public school practices. The FLRA concluded that section 241 does not require the Army to equalize the dependents school employees' and local school employees' compensation. We need not defer to the FLRA's conclusion, however, because such deference only applies when the FLRA interprets the FSLMRA. *See West Point Elementary School Teachers Assoc.,* at 940; *Dep't. of Treasury v. FLRA,* 837 F.2d 1163, 1167 (D.C.Cir.1988) (courts need not defer to FLRA decision interpreting a statute other than the FSLMRA).

Section 241 requires that the Army "to the maximum extent practicable" provide a comparable education to local public schools at a cost per pupil not exceeding the per pupil cost of free public education in local communities.

20 U.S.C. § 241(a) & (e) (1974 & Supp.1988). The Second Circuit recently held that these provisions did not specifically set the dependents schools' teachers' salaries because the Army could maintain cost parity and educational comparability despite wide variations in teachers' salaries; consequently, the Second Circuit concluded that the Army had a duty to bargain over a salary proposal. *West Point Elementary School Teachers Assoc.*, at 943.

We agree with the Second Circuit that section 241 does not specifically provide for the schools' teachers' and other employees' wages. First, section 241 as a whole demonstrates that the Army has wide discretion to set these employees' salaries. The third sentence of section 241(a) requires dependents schools outside the continental United States, Alaska, and Hawaii to provide a "comparable education" to free public schools in the District of Columbia. 20 U.S.C. § 241(a) (Supp.1988). In 1978, Congress added another sentence to section 241(a) which reads: "Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools in the District of Columbia." 20 U.S.C. § 241(a) (Supp.1988). Interpreting "comparable education" to include comparable salaries would make the additional sentence redundant.

The Army argues that this sentence is not redundant if "comparable education" includes comparable wages, but rather, the sentence is unnecessary if comparable education did not incorporate comparable salaries. According to the Army, Congress amended section 241 because it wanted to raise the Puerto Rican dependents school employees' salaries above the local schools' insufficent

wages. The Army argues that Congress could have raised their salaries without amending section 241 if this section did not require the Army to pay its school employees a comparable salary to local public school employees.

Contrary to the Army's contention, if comparable education included comparable salaries, Congress would not have needed to amend section 241 to raise the Puerto Rican schools' employees' pay. Section 241 already required the Army to provide the schools outside the United States with a comparable education to the District of Columbia's public schools; therefore, Congress did not need to add the new sentence if Congress only intended to raise the schools' salaries. Rather, Congress added this sentence to correct the existing pay practices which "invite[d] abuse but not specifying personnel practices, especially regarding salary. . . ." H.R.Rep. No. 1137, 95th Cong., 2d Sess. 108, *reprinted in* 1978 U.S.Code Cong. & Admin.News 4971, 5078. Consequently, if comparable education included comparable salaries, Congress would not have needed to pass this amendment. We decline to construe the statute to render this provision mere surplusage. *See United States v. Wang Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972) (courts should not construe statutes to make words meaningless or surplusage where Congress expressly included the words).

Second, the legislative history demonstrates that Congress did not intend comparable education to require identical salaries. In 1959, the Comptroller General issued a decision holding that under section 241 as it existed at that time, the Army could not compensate West Point teachers according to teachers' salaries in a neighboring city. In response to the Army's legislative proposals to change this ruling, Congress amended section 241 in 1965 to provide: "For the purpose of providing such comparable education,

personnel may be employed and the compensation, tenure, leave, hours of work and other incidents of the employment relationship *may* be fixed without regard to the Civil Service Act and rules. . . ." 20 U.S.C. § 241(a) (1974 & Supp. 1988) (emphasis added). By choosing the term "may," Congress did not require the military departments to establish compensation in accordance with local public schools, but merely gave military departments the discretion to deviate from the prevailing rate act and establish compensation in such manner.

A senate report similarly demonstrates that section 241 does not require comparable salaries. The senate report accompanying the 1965 amendment illustrates that Congress amended section 241 in response to the Army's request to compensate teachers comparable to the teaching profession rather than to local school practices. S.Rep. No. 311, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 1910, 1913. The Army explained that the federal pay acts did not practically accommodate the teaching profession: teachers' salary schedules are set on a school-year basis while the federal pay acts set salaries on a calendar year; federal employees receive overtime pay but teachers receive fixed amounts for extracurricular activities; and teachers do not observe the forty-hour work week of most federal employees. *See* 1965 U.S.Code Cong. & Admin.News at 1913. Because of these differences, the Army concluded: "Based upon the Department's experience in operating [dependents] schools, it is highly desirable that the personnel practices for instructional personnel be patterend after those usually encountered in the teacher profession rather than those which have been developed for the Federal Service as a whole." 1965 U.S.Code & Admin. News at 1913. Thus, Congress amended section 241 to allow the Army to compensate its teachers in accordance with the entire teaching

profession rather than mandating it to adhere to the local public schools' pay practices.

We conclude that section 241 does not compel the Army to follow local public schools' pay practices, therefore, the Army has discretion for setting the dependents schools' employees' salaries. Because the Army has such discretion, the Union's proposals do not conflict with or involve matters specifically set by law. Consequently, we hold that the Union's compensation and fringe benefits proposals involve conditions of employment subject to the duty to bargain.

B. *Compelling Need*

As stated above, no duty to bargain exists over proposals that conflict with an agency regulation for which a compelling need exists. 5 U.S.C. § 7117(a)(2) (1980). The Army contends that the Union's proposals conflict with Army Regulation 352-3, 1-7 and that a compelling need exists for this regulation. This regulation requires the dependents schools' salary schedules to equal those of the local schools "to the maximum extent practicable."[6]

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[6] This regulation provides:

1-7. Comparison factors. Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:

a. Qualifications of professional and nonprofessional personnel.

b. Pupil-teacher ratios.

c. Curriculum for grades offered, including kindergarten and summer school, if applicable.

d. Accreditation by State or other accrediting association.

e. Transportation services (student and support).

f. Length of regular and/or summer term(s).

Because some of the Union's proposals conflict with this regulation, we must decide whether a compelling need exists for this regulation.[7]

The FLRA and the Second Circuit have concluded that no compelling need exists for this regulation. A compelling need exists if the "rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment . . . of functions of the [Army]. . . . [or] the rule or regulation implements a mandate to the [Army] . . . under law . . . which implementation is essentially nondiscretionary in nature." 5 C.F.R. § 2424.11(a) & (c) (1986). We agree with the FLRA and the Second Circuit that Army Regulation 352-3, 1-7 does not "implement a mandate to the Army" because as discussed above, section 241 does not require the Army to compensate its school employees according to local public school practices. *Accord West Point Elementary School Teachers Assoc.*, at 943. Similarly, this regulation is not "essential" to the Army providing a comparable education at a comparable cost per pupil. As the Second Circuit recently concluded, the Army can achieve both of these goals notwithstanding large variations in the employees' wages because many expenses beyond their salaries enter into the per pupil expenditures.

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g. Types and numbers of professional and nonprofessional positions.

h. Salary schedules.

i. Conditions of employment.

j. Instructional equipment and supplies. Army Regulation AR 352-3, 1-7.

[7] After deciding that no compelling need exists for the Army's regulation, the FLRA concluded that the Army did not show that Sections A through G, I and J of Proposal 1 conflicted with the regulation. Because we find that no compelling need exists for this regulation, we need not address whether these sections conflict with the Army regulation.

West Point Elementary School Teachers Assoc., at 943. For example, books, building maintenance, athletic programs, clubs, and lunch services also enter into this calculation. Many factors other than teachers' compensation also affect the quality of education. Moreover, section 241 requires equality only to the maximum extent possible, not exact equality. Consequently, the Army has not established a compelling need for this regulation.

C. *Army's Right to Set its Budget*

The Army finally contends that the Union's proposals infringe upon its right to set its budget. The FLRA concluded that the Army failed to demonstrate that the Union's proposals interfere with its right to determine its budget. We must give deference to the FLRA's decision because this decision involves the application of the FSLMRA. *See* 5 U.S.C. § 7106(a)(1) (Army has a right to set its budget); *see also Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97, 104 S.Ct. 439, 444, 78 L.Ed.2d 195 (1983) (FLRA is entitled to considerable deference when it applies the FSLMRA to federal labor relations disputes). Further, we accept the FLRA's findings of fact because the record as a whole provides substantial evidence to support such findings. *See* 5 U.S.C. § 7123(c) (1980).

In *West Point*, the Second Circuit rejected the Army's contention that a salary proposal interfered with its right to set its budget. The court noted that the proposal did not specify particular salary figures and that the proposal would not necessarily increase the Army's costs. *West Point Elementary School Teachers Assoc.*, at 944. Consequently, the court deferred to the FLRA's decision that the proposal violated such right.

We similarly defer to the FLRA's decision that the Union's proposals do not invade the Army's right to make its budget. A proposal does not infringe on an agency's right to determine its budget merely because the proposed matter will increase the agency's costs. *AFGE and Air Force Logistics Command,* 2 F.L.R.A. at 607. Rather, an agency must show either that the proposals "(1) prescribe the particular programs or operations the agency would include in its budget or . . . prescribe the amount to be allocated in the budget," or (2) would cause significant and unavoidable cost increases without creating any compensating benefits. *AFGE and Air Force Logistics Command,* 2 F.L.R.A. 604. The FLRA concluded that the Army did not demonstrate that the proposals would cause substantial and unavoidable cost increases.

The evidence supports this conclusion. The proposals would not necessarily increase the Army's costs; the Army did not specify any amount by which the proposed matters would increase its budget. Further, any increase in the employees' salaries would not significantly increase the Army's budget; the Army concedes that its budget includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools. Finally, the Army did not establish that no compensating benefits would offset such costs even if its costs increased. Therefore, we defer to the FLRA's decision because the record supports the FLRA's conclusions and hold that the Army failed to establish that the Union's proposals would interfere with its right to determine its budget.

CONCLUSION

For the above reasons, we hold that the Union's proposals concerning compensation and fringe benefits involve conditions of employment within the agency's discretion, creating a statutory duty to bargain. Furthermore, we conclude that the FLRA properly found that the Army did not establish a compelling need for its regulations. Finally, we hold that the FLRA properly held that the Union's proposals did not interfere with the Army's right to determine its own budget. Consequently, we grant the FLRA's and the Union's petition to enforce the FLRA's order, and we deny the Army's petition for review.

AFFIRMED.

APPENDIX A

Proposal 1

Article 25: Salary and Benefits

A. The salary schedule shall be subject to annual review beginning approximately the 15th of December of each year. The Association shall be consulted in the review. Employer will maintain salaries on a competitive level with comparable school districts. The comparable school districts which shall be used for salary and fringe benefits comparison purposes shall be Liberty and Chatham Counties and Atlanta City Schools.

B. The ceiling for years of experience shall be extended from 16 to 20 years.

C. Pay lanes on the salary schedule shall be established for each category of teachers at Fort Stewart Schools justified by the results of a wage survey system conducted by the Employer.

D. A copy of all data collected shall be provided to the Association for independent analysis. The Employer shall consult the Association to explain its analysis and attempt to resolve any differences of opinion before the salary schedule is developed.

E. All increases on the salary schedule shall be applied across the board.

F. The salary schedule shall reflect the cost of living increase no later than thirty (30) days after it is released by the Federal government.

G. Completion of Higher Level Education

1. A teacher who completes the advanced education required to qualify for a salary under a higher education salary schedule shall be assigned the higher salary rate retroactive to the 1st day of the school year preceding the date the education was completed. Such adjustment shall be made upon receipt of written documentation in which the college or university concerned specifies the date when the teacher completed the advanced education, or the date when the teacher met the requirements for a specific degree.

H. Maintain procedure for development of salary schedule for all unit members who are on the civil service pay scales.

I. Summer school salaries shall be based on the unit member's regular hourly rate of pay.

J. Any unit member whose employment is terminated by the Employer will be given a lump sum payment for unused sick leave.

K. Mileage Reimbursement

The use of personally owned vehicles for authorized school business shall be reimbursed at the rate of 40 cents per mile.

L. Health Insurance

The Employer shall pay the full amount of health insurance premium for each unit member who elects to participate in the health insurance program. The Employer will pay the premium for the family coverage portion in the health benefit program if the unit member desires this additional coverage.

M. Life Insurance Benefit

The Employer shall pay the full amount of life insurance premium for each unit member. The coverage shall be the basic life insurance plan. Unit members shall have the option to pay the premiums for any additional insurance options elected.

N. Unit members will continue to receive all health benefits currently held which have not been specifically enumerated in previous articles of this Agreement.

O. Any subsequent benefits provided to the Federal service in health benefits, insurance benefits, disability and retirement, sick leave, and workers compensation shall automatically accrue to the unit members.

APPENDIX B

Proposal 3

Article 11: Leave

Section 1. Sick and annual leave for Unit Members whose services are required for twelve (12) months will accrue and be granted in accordance with the An-

nual and Sick Leave Act of 1951, as amended 5 USC Chapter 63 and applicable Civilian Personnel Regulations.

Section 2. Sick leave, annual leave, administrative, and other types of leave for those Unit Members whose services are not required for twelve (12) months will be administered as follows:

A. *Sick Leave.* Unit members shall accumulate sick leave at a rate of four (4) hours per pay period not to exceed thirteen (13) days shall be accredited to Unit Members at the beginning of the school year. Sick leave will accumulate without limit and can be taken for any time during the school year, but payment for sick leave taken in excess of that earned will be recovered. No accrued sick leave shall be carried over to any succeeding period when there is a break in federal employment in excess of three (3) continuous years.

1. Sick leave will be granted for the following purposes:

(a) medical, dental or optical examination or treatment;

(b) sickness or injury;

(c) medical disability connected with pregnancy;

(d) exposure to a contagious disease;

(e) illness of a member of the immediate family or near relative who resides in the same household or for whom the employee is financially responsible;

(f) death of an immediate family member or near relative.

2. As used in this section, immediate family shall mean spouse, grandparent, parent-in-law, child, grandchild, or sibling. Near relative shall include immediate family and extend to first cousin, aunt, uncle, niece, nephew, brother-in-law, daughter-in-law, or son-in-law.

3. In the cases requiring a substitute teacher, absence chargeable to sick leave will be for not less than four (4) hours. When no substitute is employed, sick leave will be taken in multiples of one hour. The decision as to whether a substitute is required shall be made solely by management officials.

4. Unit members must obtain approval from the principal before sick leave that has not been accrued can be used.

5. Unit members may be required to provide a doctor's statement in the case of a period of absence which exceeds five (5) consecutive days.

6. Upon retirement, credit for unused sick leave shall be administered in accordance with FPM Supplement 831-1 Subchapter S3-7.

7. The Employer and Association shall meet by November fifteen (15) to discuss the establishment of a sick leave bank.

B. *Personal Leave*

1. During any school year, a unit member may utilize up to a maximum of three days of accumulated sick leave for personal reasons. Notification of the use of such leave will be made one (1) day in advance. Two (2) days of personal leave may be carried over to the next year for a maximum of five (5) personal days.

2. No personal leave will be taken on the day before or immediately after spring vacation, testing days, nor on inservice days or conference days unless such leave has been approved by the Superintendent.

3. Personal leave will be for not less than four (4) hours in those cases where a substitute teacher is employed. When no substitute is employed, personal leave will be taken in multiples of one hour. The decision as to whether a substitute is required shall be made solely by management officials.

C. *Professional Leave of Absence.* Professional leave of absence may be granted by the Employer subject to the following:

1. After five (5) years of continuous service at Fort Stewart, sabbatical leave of absence without pay may be granted for up to one (1) employee per school year at the discretion of the Employer. Such leave shall be granted for the purpose of advanced study, research, professional writing, or other experience of recognized value in an employee's restrictive field.

2. Applications will be submitted to the Superintendent of Schools not later than 1 April

of the school year prior to the year the leave is to be taken. Applications will include:

(a) reason for leave;

(b) proposed length of time;

(c) where leave will be spent;

(d) outline of studies or activities to be taken.

3. Professional leave of absence will normally be granted for one (1) school year. Leave may be granted for a semester.

4. While in a leave status, employees will not be eligible to accrue sick leave but will be entitled upon return to duty to any sick leave accrued prior to the professional leave. Upon return to duty, the employee will be entitled to advance one (1) step on the salary schedule, if the studies or activities as proposed when the leave was granted have been completed.

5. Unit members will not accrue seniority but will be entitled upon return to duty any seniority accrued prior to the professional leave.

6. While in a leave status employees may continue their participation in the health and life insurance programs by payment of required premiums.

7. Unit members may utilize up to a maximum of five (5) days with pay per school year for education related purposes, such as school visitations, conferences, and workshops. Approval for the above leave shall be granted by the Superintendent.

D. *Court Leave.* Employees serving on jury duty or subpoenaed to court shall be carried on court

leave without financial loss or loss of sick or annual leave.

1. An employee on court leave may not receive fees for jury service on regular workdays in a Federal court. The employees may receive and retain fees for such duty performed on non-workdays or on holidays on which the employee would otherwise have been excused from work.

2. An employee on court leave will accept fees received from state or municipal courts and turn them in to the Civilian Pay Section of Fort Stewart Finance and Accounting Office. The employee may retain pay received for travel and subsistence expenses. Fees received for jury duty service performed outside normal duty hours or on holidays on which the employee would otherwise have been excused may be retained.

E. *Maternity/Paternity/Adoption Leave.* Maternity, paternity, and adoption leave will be administered as follows:

1. For female employees having a child, accumulated sick leave may be used one and one half (1½) months prior to having the child upon presentation of a certificate of incapacity. Once the child is delivered the employee may use sick leave up to a period of one and one half (1½) months after the child is delivered. Once the one and one half (1½) months of sick leave have been exhausted and the employee still desires further time away from work, the employee will be granted leave without pay. In no case will leave without pay be granted for more than one (1) year.

2. For male employees who desire to stay at home with their child, leave without pay may be granted for a period not to exceed one (1) year. A male employee may also make use of personal leave (see Section 1, paragraph b of this Article) for paternity leave.

3. For any employee who desires to stay at home with an adopted child, leave without pay may be granted for a period not to exceed one (1) year. Leave without pay may be taken prior to finalization of the adoption if such leave is necessary to take part in court proceeding or other action relating to the adoption. Personal Leave (Section 1, paragraph b of this Article) may also be utilized.

4. An employee shall make known intent to request leave including the type of leave, approximate dates, and anticipated duration to allow the Employer to prepare for any staffing adjustments which may be necessary.

F. *Leave Without Pay (LWOP).*

1. LWOP is requested by an employee and may be approved at the discretion of the immediate supervisor.

2. Leave without pay may be granted to unit members for the following reasons:

(a) educational leave or travel;

(b) such other reasons as are approved by the Superintendent

3. The minimum charge of LWOP is one (1) hour and additional charges in multiples of one (1) hour.

4. Maximum amount of LWOP that may be taken during one (1) school year is one (1) month except as provided in Section 1, paragraph 3 (Maternity/Paternity/Adoption Leave).

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-1071

FORT STEWART (GEORGIA) ASSOCIATION OF EDUCATORS
UNION

AND

FORT STEWART SCHOOLS
AGENCY

DECISION AND ORDER ON NEGOTIABILITY ISSUES[1]

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of three proposals.

II. Proposals 1 and 2

Proposal 1

Article 25: Salary and Benefits

A. The salary schedule shall be subject to annual review beginning approximately the 15th of December of each year. The Association shall be

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[1] Chairman Calhoun filed a separate opinion agreeing in part and dissenting in part from the decision in this case.

consulted in the review. Employer will maintain salaries on a competitive level with comparable school districts. The comparable school districts which shall be used for salary and fringe benefits comparison purposes shall be Liberty and Chatham Counties and Atlanta City Schools.

B. The ceiling for years of experience shall be extended from 16 to 20 years.

C. Pay lanes on the salary schedule shall be established for each category of teachers at Fort Stewart Schools justified by the results of a wage survey system conducted by the Employer.

D. A copy of all data collected shall be provided to the Association for independent analysis. The Employer shall consult the Association to explain its analysis and attempt to resolve any differences of opinion before the salary schedule is developed.

E. All increases on the salary schedule shall be applied across the board.

F. The salary schedule shall reflect the cost of living increase no later than thirty (30) days after it is released by the Federal government.

G . Completion of Higher Level Education

1. A teacher who completes the advanced education required to qualify for a salary under a higher education salary schedule shall be assigned the higher salary rate retroactive to the 1st day of the school year preceding the date the education was completed. Such adjustment shall be made upon receipt of written documentation in which the college or university concerned specifies

the date when the teacher completed the advanced education, or the date when the teacher met the requirements for a specific degree.

H. Maintain procedure for development of salary schedule for all unit members who are on the civil service pay scales.

I. Summer school salaries shall be based on the unit member's regular hourly rate of pay.

J. Any unit member whose employment is terminated by the Employer will be given a lump sum payment for unused sick leave.

K. Mileage Reimbursement

The use of personally owned vehicles for authorized school business shall be reimbursed at the rate of 40¢ per mile.

L. Health Insurance

The Employer shall pay the full amount of health insurance premium for each unit member who elects to participate in the health insurance program. The Employer will pay the premium for the family coverage portion in the health benefit program if the unit member desires this additional coverage.

M. Life Insurance Benefit

The Employer shall pay the full amount of life insurance premium for each unit member. The coverage shall be the basic life insurance plan. Unit members shall have the option to pay the premiums for any additional insurance options elected.

N. Unit members will continue to receive all health benefits currently held which have not been spe-

cifically enumerated in previous articles of this Agreement.

O. Any subsequent benefits provided to the Federal service in health benefits, insurance benefits, disability and retirement, sick leave, and workers compensation shall automatically accrue to the unit members.

Proposal 2

The Association and the Employer agree that the salary increase for all bargaining unit members will be 13.5% for the school year.

A. Positions of the Parties

The Agency views Proposal 1 and Proposal 2 as mutually exclusive. Specifically, the Agency claims that Proposal 1 was withdrawn and replaced with Proposal 2. Thus, the Agency contends that Proposal 1 is not properly before the Authority. Substantively, the Agency alleges generally that the proposals do not concern "conditions of employment," as defined in section 7103(a)(14) of the Statute and therefore are outside the duty to bargain under section 7117. The proposals, in the Agency's view, also interfere with its right to determine its budget under section 7106(a)(1). The Agency also asserts that the proposals violate Federal statutes, Agency regulations having the force and effect of law, and an Agency regulation for which a compelling need exists. In addition, the Agency alleges that sections L, M, N and O of Proposal 1 are non-negotiable because they concern matters specifically provided for by Federal law.

The Union explains that Proposal 1 concerns the pay-fixing process for the life of the negotiated agreement and that Proposal 2 provides for a specific salary increase for

a particular school year. See Memorandum, dated November 8, 1984, enclosed with the Petition for review. As to the substance the Union asserts that the proposals are negotiable based on *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina,* 12 FLRA 519 (1983).

B. Analysis and Conclusion

1. Proposal 1 is properly before the Authority

There is nothing in the record to support the Agency's claim that Proposal 2 was submitted as a replacement for Proposal 1. In addition, based on the Union's statement of intent, Proposals 1 and 2 concern different aspects of the pay-setting process and thus are not mutually exclusive.

2. Conditions of Employment

The Agency's position, based primarily on the legislative history of the Statute, is that Congress did not intend to include teachers' pay among negotiable conditions of employment. This Agency argument was considered and rejected by the Authority in *Fort Bragg Dependents School* and subsequent cases. Briefly stated, we have consistently held that nothing in the Statute or its legislative history prevents bargaining over employee compensation insofar as: (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and (2) the proposals involved are not otherwise inconsistent with law, applicable Government-wide rule or regulation, or with an agency regulation supported by a compelling need. *See also American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida,* 24 FLRA No. 41 (1986).

Here, the employees covered by the proposals are employed under the provisions of 20 U.S.C. § 241. We have previously held that nothing in 20 U.S.C. § 241 or in its legislative history, relied upon by the Agency, indicates that Congress intended to restrict an agency's discretion concerning the particular employment practices relating to compensation which could be adopted. *Fort Knox Teachers Association and Fort Knox Dependent Schools*, 26 FLRA No. 108 (1987), *petition for review filed sub nom. Fort Knox Dependent Schools v. FLRA*, No. 87-3593 (6th Cir. Jun. 25, 1987). Thus, the Agency has not established that either of the proposals concerns a matter specifically provided for by law, or that they are outside the Agency's discretion to adopt.

Moreover, even assuming the correctness of the Agency's position respecting negotiation of pay matters, the Agency has cited no specific grounds for finding sections A, C and D of Proposal 1 nonnegotiable. These sections do not concern the amounts of compensation to be paid unit employees. Rather, they merely authorize the Union to review and comment on data used to determine employee salary schedules. Consequently, even if compensation were found to be a nonnegotiable matter, sections A, C and D would still be within the Agency's duty to bargain.

3. *Agency's Right to Determine its Budget*

To establish that a proposal directly interferes with an agency's right to determine its budget under section 7106(a)(1) of the Statute, an agency must make a substantial showing that the proposal requires the inclusion of a particular program or amount in its budget or that the proposal will result in significant and unavoidable increases in cost not affected by compensating benefits.

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), *enforced as to other matters sub nom. Department of the Air Force v. Federal Labor Relations Authority* 695 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 945 (1982).

The Agency here contends that finding these proposals negotiable would result in a significant increase in costs for the entire dependents school system. It points out that the system is comprised of seven additional bargaining units with 626 members whose salaries total $11.3 million. It reasons that, if the proposals are found to be negotiable, the other units would seek to negotiate on similar proposals. Statement of Position at 9.

In our view, the Agency's reasoning does not satisfy the requirement of a substantial showing that the proposal would result in substantial and unavoidable cost increases not offset by compensating benefits. While the Agency provides us with the information set forth immediately above, it does not indicate how many employees would actually be affected by the proposals or the monetary increase which would be directly attributable to implementation of the proposals in other bargaining units within the system. In fact, the Agency does not advise us of the amount of the increase resulting from the proposals within the bargaining unit itself. Thus, the Agency has failed to establish that increased costs could be expected or even that increased costs would be unavoidable. *See Fort Knox Teachers Association and Fort Knox Dependents Schools*, 28 FLRA No. 29 (1987).

The Agency also has failed to show that any increased costs, which it asserts are unavoidable, would not be offset by compensating benefits. Instead, it contends that Con-

gress' action in exempting teachers from statutes governing pay and certain benefits for Government employees constitutes a finding that increases in teachers' pay are not offset by compensation benefits. Statement of Position at 8-9. We find this argument unpersuasive. Even assuming that the congressional action had the implications suggested by the Agency, the legislative action was based on the cost differential between existing pay and personnel practices under title 5 U.S. Code and those subsequently embodied in 20 U.S.C. § 241. The congressional action therefore cannot be construed to cover the alleged cost increases which would result from implementing these proposals within this bargaining unit. *See Fort Knox Dependents Schools*, 28 FLRA No. 29 (1987). Furthermore, as we noted in section B.2., above, nothing in 20 U.S.C. § 241, or in its legislative history as relied upon by the Agency, indicates that Congress sought to restrict the Agency's choice in adopting a particular employment practice relating to pay and fringe benefits not otherwise provided for by law. Moreover, as to the requirement that per pupil expenditures in dependents schools be limited to the amounts expended by comparable communities in the same state, the Authority held in *Fort Bragg Dependents Schools,* 12 FLRA 519 that employee compensation is but one of the factors to be considered in determining whether the limitation has been exceeded.

Finally, the Authority also noted in *Fort Bragg Dependents Schools* 12 FLRA 519, 523, that while the consequences of a proposal necessarily are considered in the collective bargaining process, "should matters of concern to the Agency, such as cost, prevent the parties from reaching agreement, that consideration could be presented to the Federal Service Impasses Panel in a proceeding to resolve a negotiation impasse pursuant to section 7119 of the Statute."

4. *Procurement Law and Regulations*

The Agency asserts that the proposals violate law, specifically 10 U.S.C. § 2304 concerning the solicitation of contract bids in the procurement process. The Agency also contends that the proposals violate Government procurement regulations having the force and effect of law, which govern the negotiation and administration of procurement contracts, namely the Federal Acquisition Regulation. In effect, the Agency argues that the "personal services contracts" under which bargaining unit employees are hired must be awarded in conformity with procurement law and related Federal regulations, and that bargaining over pay and related fringe benefits is inconsistent with those statutory and regulatory requirements.

We find that claim to be without merit. Essentially the same claim was raised by the Agency and rejected in *Fort Knox Teachers Association and Board of Education of the Fort Knox Dependents Schools,* 27 FLRA No. 34 (1987). In that case, we noted the well-established principle that teachers employed under 20 U.S.C. § 241 are not independent contractors but, rather, are employees of the Federal Government, subject to all statutes governing Government employment unless expressly exempted. Consequently, we determined that the Agency had failed to demonstrate that procurement law and regulations applied in any manner to, or governed the employment relationship of, teachers employed in the dependents school system. Similarly, the Agency in this case has failed to show that procurement law and regulations govern bargaining unit working conditions.

5. *The "Antideficiency Act"*

The Agency contends that, because the proposals would obligate it to expend certain funds for salaries and other

benefits in a succeeding fiscal year, they violate provisions of the "Antideficiency Act" (the Act), 31 U.S.C. § 1341.

In *Fort Knox Dependents Schools*, 27 FLRA No. 34, we examined a similar argument in response to a proposal concerning both paid and unpaid leave. In rejecting the Agency's contention that Proposal 4 in the cited case violated the Act, we noted that the Comptroller General, in interpreting the Act, has held that "salaries of Government employees, as well as related items that flow from those salaries such as retirement fund contributions, are obligations of the Government at the time they are earned, that is, when the services are provided." In this case, insofar as the proposals can be said to concern specific sums, there is no obligation to make payments until the specific service is rendered by the unit employee. Hence, there is no showing that the proposals violate the Act.

6. *Agency Regulation*

The Agency asserts that the proposals violate Army Regulation (AR) 352-3, an Agency regulation for which it alleges a compelling need exists under section 2424.11(c) of the Authority's Rules and Regulations. Specifically, the Agency states that its regulations requires equality, to the maximum practicable extent, between the conditions of employment in the bargaining unit and those of teachers in comparable school systems in Georgia where Fort Stewart is located. In support of its position, the Agency cites 20 U.S.C. § 241(a)(2) which obligates the Agency to take whatever action is necessary to ensure that the education provided by its schools is comparable to that provided to children in similar communities in the same state.

Substantially the same argument was raised by the Agency to support its claim that there was a compelling need for AR 352-3 to bar negotiation of Proposal 4 in *Fort*

Knox Dependents Schools, 27 FLRA No. 34. In that case, we found "nothing in either the law or its legislative history which persuades us that Congress intended to restrict the Agency's discretion as to the particular employment practices which could be adopted." Consequently, we held that the Agency failed to sustain its burden of showing a compelling need for AR 352-3. Moreover, even assuming the Agency had supported its compelling need argument here, it has not shown how sections A through G, I and J of Proposal 1, which assume that pay rates will be fixed in accordance with pay practices in comparable schools systems, conflict with AR 352-3.

7. *Sections L and M of Proposal 1*

Sections L and M of Proposal 1 would require, respectively, that the Agency provide health insurance and basic life insurance free of cost to employees. These two sections are to the same effect as Proposals 14 and 17 found nonnegotiable in *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina*, 12 FLRA 519 (1983). Noting that Federal law limits the amount of the employer's contribution toward the cost of health insurance, and specifically requires employees to contribute toward the cost of life insurance, the Authority held that the two proposals addressed matters provided for by Federal statutes. Because the statutory provisions cited in *Fort Bragg Dependents Schools* remain in effect, we must likewise find that sections L and M of Proposal 1 here concern matters provided for by law.

8. *Sections N and O of Proposal 1*

Section N of Proposal 1 would continue all health benefits currently accruing to employees even though not

specifically referred to in the negotiated agreement. Section O would ensure that all subsequent miscellaneous benefits bestowed on the Federal service would also be received by unit employees. The Agency's position appears to be that, because the sections concern matters covered by law, the two sections are not properly included in the negotiated agreement. We disagree. In *National Treasury Employees Union and International Revenue Service,* 3 FLRA 693 (1980) (Proposals II and III), two proposals sought to incorporate statutory provisions governing prohibited personnel practices and merit system principles into the parties' agreement. In that case the Authority held that the union could appropriately incorporate provisions of law in the negotiated agreement for the purpose of enforcing them by means of the negotiated grievance procedure. Here, the disputed sections seek to ensure that employees receive the enumerated benefit to which they are, or may be, entitled under law. Consequently, the reasoning set forth in *Internal Revenue Service* is applicable to sections N and O.

C. Conclusion

In accordance with the reasons and cases cited, Proposal 1, with the exception of sections L and M, and Proposal 2 do not conflict with law, applicable Government-wide regulations, or with Agency regulations for which there is a compelling need. Therefore, Proposal 1 with the exception of sections L and M, and Proposal 2 are within the duty to bargain. Sections L and M of Proposal 1 are inconsistent with Federal law and consequently are outside the duty to bargain under section 7117(a)(1) of the Statute.

III. Proposal 3

Proposal 3 concerns various types of leave. Because of its length, the proposal appears in an Appendix to this decision.

A. Positions of the Parties

The Agency takes the position that, with the exception of the section concerning leave without pay (section F), Proposal 3 addresses money-related fringe benefits and therefore is nonnegotiable for the same reasons as stated with regard to the Union's salary and benefits proposals. Section F assigns responsibility for approving leave without pay requests to the requester's immediate supervisor. Based on *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management,* 14 FLRA 278 (1984), *affirmed sub nom. Local 32, American Federation of Government Employees v. FLRA,* 762 F.2d 138 (D.C. Cir. 1985), among other cases, a proposal, such as section F, which prescribes a specific function to be performed by a person outside the bargaining unit is not within the duty to bargain.

The Union contends that this proposal also falls within the holding of *Fort Bragg Dependents School,* 12 FLRA 519 and consequently, it is negotiable.

B. Analysis and Conclusion

The issue of whether the various types of leave for teachers in the Agency's dependents schools are appropriate subjects for bargaining was examined in *Fort Knox Dependent Schools,* 26 FLRA No. 108. The first part of the disputed proposal in that case sought to establish the unit employees' right to sabbatical leave after 10 years' continuous service at Fort Knox. In deciding that the first part of the proposal was negotiable, we held that it "concerns a condition of employment about which the Agency has discretion under 20 U.S.C. § 241. Further, the first portion of the proposal does not conflict with 20 U.S.C. § 241 or with an Agency regulation for which a compelling need has been established by the Agency."

Consequently, based on the reasoning and cases cited in *Fort Knox Dependent Schools*, all but section F of Proposal 3 is within the duty to bargain.

Section F of Proposal 3 authorizes leave without pay (LWOP) for unit members. It further provides that LWOP "may be approved at the discretion of the immediate supervisor." The Agency contends that the latter requirement is an impermissible intrusion on its reserved right to assign work. We agree. In *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management*, 14 FLRA 278 (1984), *affirmed sub nom. Local 32, American Federation of Government Employees v. FLRA*, 762 F.2d 138 (D.C. Cir. 1985), the disputed proposal sought to require that any grievance initiated by the agency be signed by the agency head. The proposal was held to violate section 7106(a)(2)(B) of the Statute because it prescribed specific duties which particular nonbargaining unit personnel in the agency would perform. It was further noted that the proposal would effectively preclude management's assigning the duty referenced in the proposal to any other person, thereby eliminating the discretion inherent in management's right to assign work.

Here, section F of the proposal would assign approval authority for LWOP to specific management officials. Under its terms such authority could not be assigned to higher level officials who might be better positioned to assess the impact of a grant of LWOP upon the overall effectiveness of operations. Consequently, based on the reasoning and case cited in *Office of Personnel Management*, we find that section F of Proposal 2 is outside the duty to bargain because it is inconsistent with management's right to assign work under section 7106(a)(2)(B) of the Statute.

However, we note that if this section were revised to preserve management's right to designate the individual who would approve requests for LWOP, it would be negotiable. *See American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, The U.S. Army Test, Measurement, and Diagnostic Equipment Support Group, The U.S. Army Information Systems Command, Redstone Arsenal Commissary*, 27 FLRA No. 14, slip op. at 13 (1987).

IV. Order

The Agency must upon request or as otherwise agreed to by the parties, negotiate over: Proposal 1 with the exception of sections L and M; Proposal 2; and Proposal 3, except for section F.[2] The petition for review is dismissed insofar as it pertains to sections L and M of Proposal 1 and section F of Proposal 3.

Issued, Washington, D.C., July 31, 1987.

/s/ Henry B. Frazier, III
HENRY B. FRAZIER III, Member

/s/ Jean McKee
JEAN MCKEE, Member

FEDERAL LABOR
RELATIONS AUTHORITY

[2] In finding these matters negotiable we make no judgment as to their respective merits.

Separate Opinion of Chairman Calhoun

I agree with my colleagues that the issues in this case are essentially the same as those in *Fort Knox Teachers Association and Fort Knox Dependent Schools,* 26 FLRA No. 108 (1987), *petition for review filed sub nom. Fort Knox Dependent Schools v. FLRA,* No. 87-3593 (6th Cir. June 25, 1987). In my opinion in that case, I stated that in the absence of a clear expression of congressional intent to make wages and money-related fringe benefits negotiable, I would find that these matters are not within the duty to bargain. In this case, Proposal 1, subsections A, D, E, F, G, I, J, K, N, and O, Proposal 2, and Proposal 3 concern wages and money-related fringe benefits. Because I find no expression of congressional intent in this case that these matters be negotiable, I would find these proposals to be outside the duty to bargain. I note, however, with respect to subsections A and D of Proposal 1 that consistent with the Authority's decision concerning Proposal 4 in *Illinois Nurses Association and Veterans Administration Medical Center, North Chicago, Illinois,* 27 FLRA No. 79 (1987), I would find negotiable a proposal which simply required the Agency to provide information to and consult with the Union on these matters.

I am unable to determine the meanings of subsections B, C, and H of Proposal 1 from the record in this case. In my view, there is insufficient information on which to make a negotiability determination on these subsections. I would dismiss the Union's petition as to them. In addition, I note that subsection C(6) of Proposal 3 is similar to section 8(g) of Provision 10, which the Authority found to be negotiable in *American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Fort Bragg Dependent Schools, Fort Bragg, North Carolina,* 28 FLRA No. 66 (1987). Unlike the provision in

that case, which required the continuation of insurance premiums "in accordance with Federal regulations," Proposal 3 in this case does not refer to applicable regulations. As such, it would constitute an independent contractual requirement concerning the matter in my view.

I agree with my colleagues that subsections L and M of Proposal 1 concern matters provided for by Federal law.

Issued, Washington, D.C., July 31, 1987.

/s/ Jerry L. Calhoun

JERRY L. CALHOUN, Chairman

FEDERAL LABOR
RELATIONS AUTHORITY

APPENDIX

Proposal 3

Article 11: Leave

Section 1. Sick and annual leave for Unit Members whose services are required for twelve (12) months will accrue and be granted in accordance with the Annual and Sick Leave Act of 1951, as amended 5 USC Chapter 63 and applicable Civilian Personnel Regulations.

Section 2. Sick leave, annual leave, administrative, and other types of leave for those Unit Members whose services are not required for twelve (12) months will be administered as follows:

A. *Sick Leave.* Unit members shall accumulate sick leave at a rate of four (4) hours per pay period not to exceed thirteen (13) days shall be accredited to Unit Members at the beginning of the school year. Sick leave will accumulate without limit and can be taken for any time during the school year, but payment for sick leave taken in excess of that earned will be recovered. No accrued sick leave shall be carried over to any succeeding period when there is a break in federal employment in excess of three (3) continuous years.

1. Sick leave will be granted for the following purposes:

(a) medical, dental or optical examination or treatment;

(b) sickness or injury;

(c) medical disability connected with pregnancy;

(d) exposure to a contagious disease;

(e) illness of a member of the immediate family or near relative who resides in the same household or for whom the employee is financially responsible;

(f) death of an immediate family member or near relative.

2. As used in this section, immediate family shall mean spouse, grandparent, parent-in-law, child, grandchild, or sibling. Near relative shall include immediate family and extend to first cousin, aunt, uncle, niece, nephew, brother-in-law, daughter-in-law, or son-in-law.

3. In the cases requiring a substitute teacher, absence chargeable to sick leave will be for not less than four (4) hours. When no substitute is employed, sick leave will be taken in multiples of one hour. The decision as to whether a substitute is required shall be made solely by management officials.

4. Unit members must obtain approval from the principal before sick leave that has not been accrued can be used.

5. Unit members may be required to provide a doctor's statement in the case of a period of absence which exceeds five (5) consecutive days.

6. Upon retirement, credit for unused sick leave shall be administered in accordance with FPM Supplement 831-1 Subchapter S3-7.

7. The Employer and Association shall meet by November fifteen (15) to discuss the establishment of a sick leave bank.

B. *Personal Leave*

1. During any school year, a unit member may utilize up to a maximum of three days of accumulated sick leave for personal reasons. Notification of the use of such leave will be made one (1) day in advance. Two (2) days of personal leave may be carried over to the next year for a maximum of five (5) personal days.

2. No personal leave will be taken on the day before or immediately after spring vacation, testing days, nor on inservice days or conference days unless such leave has been approved by the Superintendent.

3. Personal leave will be for not less than four (4) hours in those cases where a substitute teacher is employed. When no substitute is employed, personal leave will be taken in multiples of one hour. The decision as to whether a substitute is required shall be made solely by management officials.

C. *Professional Leave of Absence.* Professional leave of absence may be granted by the Employer subject to the following:

1. After five (5) years of continuous service at Fort Stewart, sabbatical leave of absence without pay may be granted for up to one (1) employee per school year at the discretion of the Employer. Such leave shall be granted for the purpose of advanced study, research, professional writing, or other experience of recognized value in an employee's respective field.

2. Applications will be submitted to the Superintendent of Schools not later than 1 April

of the school year prior to the year the leave is to be taken. Applications will include:

(a) reason for leave;

(b) proposed length of time;

(c) where leave will be spent;

(d) outline of studies of activities to be taken.

3. Professional leave of absence will normally be granted for one (1) school year. Leave may be granted for a semester.

4. While in a leave status, employees will not be eligible to accrue sick leave but will be entitled upon return to duty to any sick leave accrued prior to the professional leave. Upon return to duty, the employee will be entitled to advance one (1) step on the salary schedule, if the studies or activities as proposed when the leave was granted have been completed.

5. Unit members will not accrue seniority but will be entitled upon return to duty any seniority accrued prior to the professional leave.

6. While in a leave status employees may continue their participation in the health and life insurance programs by payment of required premiums.

7. Unit members may utilize up to a maximum of five (5) days with pay per school year for education related purposes, such as school visitations, conferences, and workshops. Approval for the above leave shall be granted by the Superintendent.

D. *Court Leave.* Employees serving on jury duty or subpoenaed to court shall be carried on court

leave without financial loss or loss of sick or annual leave.

1. An employee on court leave may not receive fees for jury service on regular workdays in a Federal court. The employees may receive and retain fees for such duty performed on non-workdays or on holidays on which the employee would otherwise have been excused from work.

2. An employee on court leave will accept fees received from state or municipal courts and turn them in to the Civilian Pay Section of Fort Stewart Finance and Accounting Office. The employee may retain pay received for travel and subsistence expenses. Fees received for jury duty service performed outside normal duty hours or on holidays on which the employee would otherwise have been excused may be retained.

E. *Maternity/Paternity/Adoption Leave.* Maternity, paternity, and adoption leave will be administered as follows:

1. For female employees having a child, accumulated sick leave may be used one and one half (1½) months prior to having the child upon presentation of a certificate of incapacity. Once the child is delivered the employee may use sick leave up to a period of one and one half (1½) months after the child is delivered. Once the one and one half (1½) months of sick leave have been exhausted and the employee still desires further time away from work, the employee will be granted leave without pay. In no case will leave without pay be granted for more than one (1) year.

2. For male employees who desire to stay at home with their child, leave without pay may be granted for a period not to exceed one (1) year. A male employee may also make use of personal leave (see Section 1, paragraph b of this Article) for paternity leave.

3. For any employee who desires to stay at home with an adopted child, leave without pay may be granted for a period not to exceed one (1) year. Leave without pay may be taken prior to finalization of the adoption if such leave is necessary to take part in court proceeding or other action relating to the adoption. Personal Leave (Section 1, paragraph b of the Article) may also be utilized.

4. An employee shall make known intent to request leave including the type of leave, approximate dates, and anticipated duration to allow the Employer to prepare for any staffing adjustments which may be necessary.

F. *Leave Without Pay (LWOP).*

1. LWOP is requested by an employee and may be approved at the discretion of the immediate supervisor.

2. Leave without pay may be granted to unit members for the following reasons:

(a) educational leave or travel;

(b) such other reasons as are approved by the Superintendent

3. The minimum charge of LWOP is one (1) hour and additional charges in multiples of one (1) hour.

4. Maximum amount of LWOP that may be taken during one (1) school year is one (1) month except as provided in Section 1, paragraph e (Maternity/Paternity/Adoption Leave).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8734

FORT STEWART SCHOOLS, PETITIONER, CROSS-RESPONDENT

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT, CROSS-PETITIONER

FORT STEWART ASSOCIATION OF EDUCATORS, INTERVENOR

On Petition for Review of an Order of the Federal Labor Relations Authority

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion November 21, 11 Cir., 1988, __ F.2d __).
(February 17, 1989)

[Filed Feb. 17, 1989]

Before VANCE and HATCHETT, Circuit Judges, and NESBITT*, Senior District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

* Honorable Lenore C. Nesbitt, U.S. District Judge for the Southern District of Florida, sitting by designation.

polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
JOSEPH W. HATCHETT
United States Circuit Judge

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* Honorable Lenore C. Nesbitt, U.S. District Judge for the Southern District of Florida, sitting by designation.

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